

United States District Court
Southern District of Indiana

FILED
U.S. DISTRICT COURT
INDIANAPOLIS DIVISION

2016 JUN -1 PM 4:14

SOUTHERN DISTRICT
OF INDIANA
LAURA A. BRIGGS
CLERK

Mark A. White

v.

United States of America

Case No. IP 98-CR-03 M/F

Motion for A Certificate of Appealability
Pursuant to Rule of Appellate Procedure
22(b)1 and 28 U.S.C. 2253(c)(1) and
(c)(2).

NOW COMES Mark A. White and respectfully moves this Honorable Court for a Certificate of Appealability. The COA Statue permits the issuance of a COA 28 U.S.C. 2253(c)(1) only where a Petitioner has made "A substantial showing of a denial of a constitutional right 28 U.S.C. 2253(c)(2)." The Petitioner must show that a reasonable jurist could debate whether, or for that matter, agree that the Petition should have been resolved in a different manner or the issue presented are adequate enough to deserve encouragement to proceed further. Slack v. McDaniel 529 U.S. 473, 484 120 S.Ct 1595 146 Ed 2d 542. (2000) Barefoot v. Estelle, 463 U.S. 880. 893 N.4. 103 S.Ct 3383, 77 L.Ed 2d 1090 (1983).

Issue for COA Certification

1. Whether Post Conviction Counsel was ineffective on White's initial review of Collateral Proceedings for miscalculating the original 28 U.S.C. 2255 filing date.

2. Whether White has made a substantial showing of his fifth amendment right to due process being denied in light of IN RE Winship 397. U.S. 358, 364 25 L.Ed 2d 368 90 S.Ct 1068 (1970)?

3. Whether the District Judge knew that, the removal of the assessment of facts from the jury violated the Petitioner's right to due process and the sixth amendment guarantees to a fair sentencing under Winship and Gaudin?

4. Since the constitutionality of Judge found facts are unconstitutional now, then they were unconstitutional when the sentencing Judge applied his finding of facts to Petitioner's sentencing all in clear violation of the sixth amendment Jurisprudence.

"Footnote": I Mark White am aware that this court likes to consider motion in this court as 28 U.S.C. 2255, regardless of the caption or heading...I would like to address and clarify that. This is not a 2255 or a successive 2255 Petition, but rather a 28 U.S.C. 2253(c)(2) showing a denial of a substantial constitutional right being violated.

Discussion of Issues

In light of the recent Seventh Circuit decision in *Joseph Lombardo v. United States* 15-2860, and the U.S. Supreme Court decision in *Trevino v. Thaler*, 133 S.Ct 1911, (2013) and *Martinez v. Ryan* 132 S.Ct 1309 (2012) *Ramirez v. United States*, 799 F.3d 845, 852-54 (7th Cir. 2015), is whether a petitioner has cause to excuse a procedural default under equitable tolling because of Ineffective Assistance of Counsel on a initial-review of collateral proceeding.

In May of 2007, Petitioner White's family retained Dana Chilress-Jones to prepare and file a section 28 U.S.C. 2255 Motion. There were approximately six (6) months remaining on the one year limitation period under the AEDPA. Following the retainment of Attorney Jones, White wrote directly to Mrs. Jones and advised her that the petition for Writ of Certiorari was denied by the United States Supreme Court on November 6, 2006 and expressed a belief that he (White) had one year from that date to file a timely motion under 28 U.S.C. 2255, to vacate, set aside, or correct date for commencing the one-year limitation period under the AEDPA. White advised Attorney Jones to verify the correct date through an independent investigation...see Exhibit A, White followed the letter identified in paragraph 2 herein with at least two additional letters inquiring about the process on the Section 2255 Motion and again expressed the belief that November 6, 2007 was the deadline date for filing a timely 2255 motion. Nevertheless, because the Petition for rehearing was denied on January 8, 2007, White again expressed **uncertainty** about which date controlled and directed Attorney Jones to verify the correct date.

On December 27, 2007, after the deadline under the AEDPA had expired, White received a letter from Attorney Jones informing him that, contrary to White's strong assertion that Attorney Jones not contact the Attorney who represented him on direct appeal (Attorney William H. Dazey Jr.), she finally contacted him to find

out procedural history of White's, and specifically to confirm that reconsideration of the Petition for Writ of Certiorari had been denied on January 8, 2007...see Exhibit D. Attorney Jones also explains that she will be coming to visit White at the Federal Correctional Institution - Terre Haute Indiana 47808, either Saturday, January 4, 2008 or the next Sunday, January 5, 2008 to go over the 2255 Petition, so that the same can be filed on Monday, January 6, 2008.

On January 8, 2008, Attorney Jones filed White's Motion Pursuant to 28 U.S.C. 2255 in the above caption case and numbers within the United States District Court, Southern District of Indiana. January 8, 2008, is the one year anniversary date the United States Supreme Court denied the Petition for rehearing the denial of Certiorari (see docket sheet - 1:8-09) Section 2255 Motion.

Having the duty to know what the law requires, Attorney Jones either knew, or should have known, that the one-year limitation period under the AFDPA began to run when the Supreme Court denied the Petition for the Writ of Certiorari on November 6, 2006, and not the subsequent date that the Petition for rehearing was denied.

Attorney Jones never provided White with a copy of the government's response to the Section 2255 Motion, and the only reason White became aware of the basis upon which the United States opposed the Section 2255 Motion was because that basis appeared on the first page of the Court's Order denying the Section 2255 Motion.

White filed a motion to remove Attorney Jones as Counsel of record because she had deliberately defrauded him by filing the motion under 28 U.S.C. 2255 beyond the one-year limitation period. After knowing, or having reason to know, that the Petition for Writ of Certiorari was denied on November 6, 2006, and that November 6, 2006, was the correct date for calculating the one-year limitation period under the AFDPA. Attorney Jones made the false representation of material fact, with knowledge of its falsity and with intent to deceive White into believing that the one-year limitation period could be calculated from the denial of Petition for rehearing the denial of Certiorari on January 8, 2007. Had it not been

for the Ineffective Assistance of Counsel on White's initial 28 U.S.C. 2255 Post Conviction Proceedings a just Court would have been able to determine the constitutionality of White's conviction. White is entitled to equitable tolling because of the Ineffective Assistance of Counsel in his initial review collateral proceedings, see Trevino v. Thaler, 133 S.Ct 1911 (2013) Martinez v. Ryan 132 S.Ct 1309 (2012), Ramirez v. United States, 799 F.3d 845, 852-54 (7th Cir. 2015), and Joseph Lombardo v. United States, case number 15-2860. In recent cases from the United States Supreme Court has stated that, the landscape has changed regarding the effect or negligent counsel during initial-review collateral proceedings. A Certificate of Appealability is a showing of a denial of a substantial constitutional right. Petitioner White sought professional legal counsel to represent and present his constitutional claim to the court since he is ill equipped to represent himself. Since the collateral proceedings is the equivalent of a prisoner's Direct Appeal as a claim of Ineffective Assistance of Counsel. White has been denied fair process and the opportunity to comply with the Federal Procedures and obtain an adjudication on the merits of his claim. Without the adequate representation of Effective Assistance of Counsel during his initial review of his 2255 collateral proceedings. White asserts that Attorney Jones inadequate assistance of counsel at his initial review for his 28 U.S.C. 2255 collateral proceedings establishes cause to excuse the procedural default. The doctrine barring procedurally defaulted claims from being heard is not without exceptions. A prisoner may obtain Federal review of a defaulted claim by showing cause for the default and prejudice from a violation of Federal law. In Coleman v. Thompson 501 U.S. 722, 753-754 111 S.Ct 2546 115 L.Ed 2d 640 (1991) However, did not present the occasion to apply this principle to determine whether Attorney's errors in initial-review of collateral proceeding may qualify as cause for a procedural default. So for White to present a claim of Ineffective Assistance of Counsel in accordance with Federal procedures, then it is more likely that White needed an effective attorney assistance, which Attorney Dana Childress-Jones did not provide in White's initial review of his claim.

U.S.C. 2255 collateral proceedings...since a persons inability to present a claim of trial error is of particular concern when the claim is one of ineffective assistance of counsel.

The right to effective assistance of counsel at trial is a bedrock principle in our justice system. However, White asserts that the ineffectiveness of his post conviction attorney is cause as a ground for relief under *Holland v. Florida* 560 U.S. 130 S.Ct 2549, 177 L.Ed 2d 130 (2010). In the words of justice Frankfurter, "Equity eschews mechanical rules; it depends on flexibility." *Holmberg v. Armbricht*, 327 U.S. 352, 396, 66 S.Ct, 582, 584, 90 L.Ed 743 (1946). Every Circuit Court of Appeals that has considered the subject has taken the position that serious attorney misconduct may constitute an extraordinary circumstance for purpose of equitable tolling...see *United States v. Martain* 408 F.3d 1089, 1093 (8th Cir. 2005) (stating that "serious attorney misconduct as opposed to mere negligence, may warrant equitable tolling") accord, *Fleming v. Evans* 481 F.3d 1249 (10th Cir. 2007) *Baldayaque*, 338 F.3d at 145; *Spitsyn v. Moore* 345 F.3d 796 (9th Cir. 2003) *United States v. Wynn*, 292 F. 3d 266 (5th Cir. 2002) *Nara v. Frank* 264 F.3d 325 (4th Cir. 2000) and *Downs v. McNeil* 520 F.3d 1311 (11th Cir. 2008) (Rejecting the 7th Circuit bright line rule). and so has the Seventh Circuit in *Joseph Lombardo v. United States* 15-2860, on April 25, 2016.

Together these Circuits have declined to impute attorney's misconduct to a client where the attorney has made misrepresentation to the client, disregard the client's instructions, refused to return documents, or abandoned the clients case. In *Baldayaque*, for example, the Petitioner's attorney ignored a directive to file a petition under 28 U.S.C. 2255 failed to conduct any legal research and wrongly advise the Petitioner's. However, White repeatedly expressed his uncertainty about which date controlled the commencement of the one-year limitation period under the AEDPA (see Exhibit A,B,C,) and repeatedly asked Attorney Jones to determine the correct date for commencing the one-year limitation period under the AEDPA. As such White believed that the motion as beyond the one-year limitation period set forth in the AEDPA.

White has exercised due diligence in investigating the fraud and bringing it to the courts attention...see Robinson v. Johnson, 313 F.3d 128, 142 (3d Cir. 2002) (explaining that a Petitioner must "exercise reasonable diligence in investigating and bringing the claim"). The record of the instant shows that once White became aware of Attorney Jones being ineffective and responsible for the untimely filing of his initial review of 28 U.S.C. 2255 collateral proceedings he embarked upon a course to bring the misconduct to the attention of the court...see Exhibit E C.O.A. filed May 8, 2009, at 4:23(P.M.) and requesting "Equitable Tolling" of the limitation period. Moreover, White has been very diligent in his efforts to have the claims raised in his Section 2255 Motion resolved on the merits and has presented equitable reasons for doing so. A COA may issue only for a claim for which White has made a substantial showing of a constitutional right. This means according to Miller-El v. Cocker 11, 537 U.S. 332 (2003) that "Reasonable Jurists could debate whether (or for that matter, agree that) the petition should have been resolved in a different manner or that the issue presented were adequate to deserve encouragement to proceed further." Id. 366 "Quoting Slack v. McDaniel 529 U.S. 473 (2000) Dalton v. Battaglia, 402 F.3d 729, 738 (7th Cir. 2005) Because White is requesting an evidentiary hearing on the ineffective assistance of counsel claim and fraudulent conduct of attorney Jones to determine whether it constitutes exceptional circumstances to equitable tolling of his initial review of Id 28 U.S.C. 2255 collateral proceedings. However, in 1970, the United States Supreme Court ruled in the case of Samuel Winship 397 U.S. 358, 364 25 L.Ed 2d 368 90 S.Ct 1068 (1970). As a general rule each element of a charged crime must be set forth in an indictment...see Hamling v. United States 418 U.S. 87 117, 41 L.Ed 2d 590 94 S.Ct 2887 (1974), and in Winship

397 U.S. 358. Every element of the crime must be determined by the jury, assuming the jury right was invoked...see *Sullivan v. Louisiana* 508 U.S. 275 277-278, 124 L.Ed 2d 182 113 S.Ct 2c78 (1993).

In 1999 Petitioner White exercised his right to trial by jury 29 years after the issuance of *Winship*. The jury in White's case found him guilty of drug conspiracy. As in instruction NO 16 of the jury instruction...see exhibit F. Reads each defendant is charged in count 1 of the indictment, with conspiracy to possess with the intent to distribute and to distribute cocaine in violation of title 21 U.S.C. Section 841 (A)(1) and 846. As required by law the relationship between crime and punishment was clear. The penalty which the defendant was exposed should have been in the indictment. In Petitioner White's case, the defendant had no penalty phase in his indictment, leaving the jury with instruction 52...see exhibit G. The evidence received in this case need not prove the actual percentage or purity of cocaine that was part of the alleged transaction by the defendant. The government must prove beyond a reasonable doubt, however, that a measurable amount of the controlled substance was, in fact cocaine. "The word measurable means what can be measured." **Implanting the thought of a small amount.** However, in the other two charges in which the defendant was facing, a penalty was described in the jury instruction and the indictment like 18 U.S.C. 1956 (A)(1)(A) and (h) and 18 U.S.C. 1512(A)(1)(c) 1513(A)(1)(b). The government deliberately left out the penalty phase in the indictment, because the government knew that **the Judge was going to remove from the jury the assessment of facts concerning elements of the offense required by law to be proved to the jury.** The sixth amendment provides for a trial by jury as a double security against prejudice of a Judge who may partake of the wishes and opinions of the government. **The Judge cannot soundly or morally state under oath that he did not know the penalty phase was not in the indictment, nor can the Judge morally or ethically state under oath that his assessment of the facts did not violate the petitioner's**

fifth amendment right to due process under Winship. "The District Court violated the cardinal principle that the jury is to determine assessment of facts."

The Judge in Petitioner White's case, when his assessment of facts was unconstitutional and the sentence imposed was unconstitutional and since it was unconstitutional it is as inoperative as if it had never been passed...see Chicago I and L.R. Co v. Hackett 228 U.S. 559, 566, 57 L.Ed 966 33 S.Ct 581 (1993) because a law repugnant to the constitution "is void" and is as no law. "ExParte Siebold, 100 U.S. 371, 376, 25 LEd 717 (1880). In fact what a court does with, regards to an unconstitutional law is simply ignore it. It decides the case "disregarding the [unconstitutional] law"...see Marbury v. Madison, 1 Crunch 137, 178, 2. L.Ed 60 (1803) The habeas corpus statue permits a federal court to entertain a petition from a federal prisoner through 28 U.S.C. 2253(c)(2) only on the ground of a denial of a substantial constitutional violation and that, a jurist of reason would debate a different outcome. In Petitioner's White's case the jury foreman Joel Greenburg stated in exhibit H, that the deceased person told him. Agent Neukam's testimony was used with the intention of establishing the drug amounts that he testified to. In order to satisfy the measurable amount requirements in the jury instruction and verdict.

The jury didn't rely upon the witnesses testimony which was deemed to be inconsistent to the point of being unreliable but instead relied upon agent Neukam's testimony...testimony which lead to jury foreman Joel Greenberg's statement to the Indianapolis Star News, staff writer Susan Schramm about the jury being spoken to from the grave by a deceased man. The testimony was so compelling the District Judge stated on the record, you have heard the testimony of the deceased person...see exhibit I, also the District Court states on the record, when Attorney Bill Dazey states, can I now disclose that I just dreamed up that declaration of deceased declarant?

"The District Court states, we all know you did, we all know you

did, "but that jury listened to those statements and they listened to us treat 'him' (meaning the deceased person) as if he had been there." So the jury's foreman's truthfulness about the deceased person speaking from the grave, was the same voice and assessment of thought and intent the court, the attorney's, and prosecutor heard when agent Neukam testified to these statements, "which the Judge said were not being introduced as statements, but were statements...see exhibit J, Page 5669. "Quoting the Court, As I said in my written entry, under the cases that I cited that those **statements** that he made to the police officer are admissible. Now I **just said statements**, and I said they weren't **statements** and it sounds as if I mean **statements** under the rule."

These statements by the District Court and Jury Foreman contests and leaves no doubt in the jury's verdict of guilt. Not the Seventh Circuit theory of assumption of what any reasonable jury would have done. Because we know what the jury actually did according to the jury foreman Joel Greenberg's statements to staff writer Susan Schramm of the Indianapolis Star News. "This information helped corroborate other testimony about the drug organization said a veteran juror, who has served on three juries...see exhibit H, in *Francis v. Franklin* 471 U.S. 307, 324 N. 9. 85 L.Ed 2d 344, 105 S.Ct 1965 (1985). We presume that jurors, conscious of the gravity of their task, attend closely to the particular language of the trial court's instruction in a criminal case. *Richardson v. Marsh* 481 U.S. 200, 206, 95 L.Ed 2d 176, 107 S.Ct 1702 1987, and *Yates v. Evall*, 500 U.S. 391 403 114 LEd 2d 432, 111 S.Ct 1884 (1991). However, the Seventh Circuit assumption that Willis' statements had no impact on the jury's findings and verdict are in great doubt according to Joel Greenberg and the District Court treating the deceased person like he was right there in the courtroom. An evidentiary hearing needs to be held to determine, whether a jurist of reason could debate or agree that the petition should have been resolved in a different manner. In *Penry v. Lynaugh* 492 U.S. 302, 330, it follows that, a court has no authority to leave in place a conviction or sentence that violates

a substantial rule, regardless of whether the conviction or sentence became final before the rule was announced. Under 21 U.S.C. 841(b)(1)(c), the Petitioner's maximum is 20 years. Since no drug amount or penalty phase was in the Petitioner's indictment in jury instruction 63 Exhibit K, the District Court stated in the instruction that, I instruct you that the matter of the penalty to be imposed or the disposition to be made of this case if a verdict of guilty is reached is not before you, the jury, but that this is a matter for the court to determine or fix...Jury instruction No. 63 see Exhibit K.

After reading Exhibit K, there can be no question that, the judges failure to abide by the constitution results in violation of the cardinal principle of the constitution. When the court removed the assessment of fact finding from the jury to determine the penalty phase of the Petitioner's. In United States v. Olano 507, U.S. 725, 123, L.Ed 2d 508, 113 S.Ct 1770 (1993). A deviation from a legal rule, during the District Courts proceedings is an error unless the defendant has waived the rule. However, if the defendant did not waive the rule, then there has been an "error" within the meaning of the Rule 52(b) despite the absence of a timely objection. This error affected the substantial rights and prejudiced the Petitioner and the outcome of the District Court proceedings. The District Court violated the cardinal principle that the jury is to determine assessment of fact finding.

In 1986, the United States Supreme Court deviated from the framers of the constitution intent and the guarantees of the constitution through the wrongly decided decision of McMillan v. Pennsylvania 477 U.S. 79. 91. L.Ed 2d 67. 106. S.Ct 2411 (1986) which was held that, a defendant's due process rights were not violated, when a sentencing Judge decided facts that raised the defendant's maximum and minimum sentence using the preponderance of the evidence standard. The U.S. Supreme Court has resolved the tension between the Circuits. However, in 2000, when the United States Supreme Court ruled in Apprendi v. New Jersey 530 U.S. 466, 483, N. 10, 490 120 S.Ct 2348 147 L.Ed 2d 435, (2000). Any fact that increases the

penalty

penalty to which a defendant is exposed constitute an element of a crime and must be found by the jury not the Judge see *Cunningham v. California* 549 U.S. 270, 281, 127, S.Ct 856, 166 L.Ed 2d 856 (2007). The Supreme Court has held that, a substantial unreasonable penalty is **illegal** and must be set aside. It unavoidably follows that any fact necessary to prevent a sentence from being substantively unreasonable and thereby exposing the defendant to the longer sentence is an element that must be either admitted by the defendant or found by the jury. It may not be found by a Judge. In 2000 Petitioner White was on direct review and the Seventh Circuit limited *Apprendi*'s reach by standing firm to the Circuit law, that drug quantity is not an element of the offense and denied White the constitution guarantee's of the 5th and 6th amendment under *Winship* and *Apprendi* by assuming what any reasonable jury would have done. In *Byorkman* 270 F.3d 49h and *United States v. Smith* 308 F.3d 726, "If drug amount was a true element of 841, then a failure by a jury to agree on the drug amount would mean that, there is no offense at all." *Apprendi* does not rewrite or change the elements of any federal offense. However the appellate court and District Court are assumed to have known that, the reasonable doubt standard of proof applied under *Winship*. Since *Winship* expressly held that the reasonable - doubt standard is a prime instrument for reducing the risk of convictions resting on factual errors. The standard provides concrete substance for the presumption of innocence that, bedrock "Axiomatic and elementary" principle whose "enforcement lies at the foundation of the administration of our criminal law." Due Process commands that, no man shall lose his liberty unless the government has borne the burden of convincing the fact finder of his guilt. To this end, the reasonable doubt standard is indispensable for it "impressess" on the trier of fact, the necessity of reaching a subjective state of certitude of the facts in issue 397 U.S. at 363-364, 25, 368, 90 S.Ct 1068, 51. In *United States v. Olano* 507 U.S. 725 (1993) the government conceded and the U.S. Supreme Court accepted that the District Court's interpretation of federal rule of criminal procedure 24(c) was plainly

erroneous. The error itself is that, the Judge should have known the law, where Circuit law is clearly contradicted by the later Supreme Court opinion, like in Appendi, when the Supreme Court opinion applied the correct standard of proof beyond all reasonable doubt. The District Court should have known at that point, that his removal of the assessment of facts from the jury violated the Petitioner's 5th and 6th amendment right. The Petitioner has been prejudiced by the illegal sentence, which constitutes a clear miscarriage of justice and each day the Petitioner suffers in prison is an act of cruel and unusual punishment. The government and Court of Appeals might say that, the Petitioner should have ~~objected~~ to the drug amount at sentencing, which the defendant did object to the P.S.I. Report and guideline calculation, but to no avail. The objections were overruled, because it was the Judge who determined the drug amount, and appealing these objections in the Seventh Circuit was a frivolous thing to do. So it's quite hard to determine, whether Counsel's failure to object on appeal was the norm or that Counsel's silence was due to his incompetence of the law. But in any event, the Judge should have known the law. Since the Judge is the referee of the Court and a evidentiary hearing should be ordered to determine if the Petitioner's claim should go any further.

Ineffective Assistance of Trial Counsel for failing to object to the District sentencing enhancement based upon drug quantity that was not submitted to the jury, in violation of Apprendi v. New Jersey 530 U.S. 466 (2000) and thereby subjected the error to heavier burden for White to meet on Direct Appeal. During the trial, the jury was not instructed to determine the amount of drugs involved in the conspiracy, as such, **the jury verdict did not authorize** the District Court to impose a sentence beyond the default statutory maximum of 20 years found in 21 U.S.C. 841(b)(1)(c), for an unspecified quantity of cocaine powder. This is so because under the Seventh Circuit decision in **U.S. v. Knight** 342 F.3d 697, (7th Cir. 2003) Before a District Court is **authorized** to impose a sentence beyond 20 years set forth in 841(b)(1)(c) the jury must first return a special verdict finding of a specified type and quantity of drugs that is sufficient to trigger a statutory maximum above that found in 841(b)(1)(c) for a cocaine conspiracy.

Conclusion

For the foregoing reason, Petitioner White contends that Attorney Dana Childress-Jones, perpetrated a fraud and committed an egregious act of ineffective assistance of counsel in White's initial 28 U.S.C. 2255 collateral review proceedings, which directly effected the timelines and outcome of his Section 2255 Motion being filed in the District Court.

In the United States of America, the right to effective assistance of counsel is a bedrock principle of our justice system. The Supreme Court has stated in **Martinez v. Ryan** 566 U.S. 132 S.Ct 1309 182 L.Ed 2d 272, 2012 U.S. (2012), that a prisoner may establish cause to excuse a procedural default are elaborated in the exercise of a courts discretion. These rules reflect an equitable judgment that only where a prisoner is impeded, may a Federal Habeas Court excuse the prisoner from the usual sanction of default by allowing a Federal Habeas Court to hear a claim of ineffective assistance of trial counsel, when an attorneys error caused a procedural default in the initial collateral review proceedings, acknowledged as equitable matter, that the initial-review collateral proceeding. If undertaken without counsel's ineffective assistance. The Petitioner's 28 U.S.C. 2255 would have been given the proper consideration for which White's substantial constitutional claims were presented. White's Post-conviction Attorney incompetence and negligence prejudiced and precluded White's initial 28 U.S.C. 2255 to be deemed time barred. White is serving a 40 year sentence and his family raised money to retain Dana Childress-Jones to file White's Section 2255 Motion. Since a criminal defendant generally only gets one chance to file and challenge the judgment and sentence under 28 U.S.C. 2255 White trusted that his Attorney had the requisite knowledge of Federal rules, skills, and competence to ensure that his motion would be filed in accordance with the applicable rules of the United States Supreme Court and Justice System. White's Attorney admittedly failed him in this respect, one would assume that this honest mistake had no real ramifications. While

it is incontrovertible that, post conviction counsel's miscalculation of a 28 U.S.C. 2255 deadline caused grave ramifications for White. Like the District Court and Appellate Court refusing to hear or address the constitutionality of White's claims and conviction by a just court.

Prior to the deception of Attorney Childress-Jones, White recalls a conversation concerning **A.U.S.A. Timothy Morrison**, who was Attorney Jones's mentor in college and after this conversation, is where the pure intent to deceive White begin. Because White has substantial constitutional claims that needs to be addressed and once they are presented and heard in a just court, White's conviction will be overturned. And what better way to repay her mentor then to tank the biggest case of his career. In May of 2009, Petitioner White filed a 28 U.S.C. 2255(c)(2) outlining the ineffective assistance of his post conviction counsel, and the pure intent to deceive White to believe that , the one-year limitation period commenced on the date the Supreme Court denied petition for rehearing of the denial of certiorari. White believe that, Attorney Jones knew, the only way to deceive White and tank his initial review of collateral proceeding would be to time bar White. To have any just court to hear his issues in any court, since this was the leading principle of **Coleman v. Thompson** and the Seventh Circuit Bright Line Standard, until **Joseph Lombardo v. United states**, and **Martinez v. Ryan** which has changed the landscape regarding the effects of negligence of counsel during initial review of collateral proceedings. Trevino v. Thaler 133 S.Ct 1911 (2013), Martinez v. Ryan 133 S.Ct 1309 (2012) Joseph Lombardo v. United States 15-2860. The Supreme Court has departed from its earlier approach of **Coleman v. Thompson** 501 U.S. 722 (1991), so a evidentiary hearing needs to be held to determine the effects Attorney Jones had on White's initial reveiw of collateral proceedings. Since attorney Jones acted and presented herself as an Attorney of law and officer of the court, who willfully and intentionally deceived White into believing that her misconduct was of competent assistance. However, a Petitioner is entitled to an evidentiary hearing on his claims where he alleges facts that, if true would entitle him to relief.

Lafuente v. United States 617 F.3d 944 (7th Cir. 2010) in order to succeed on a claim of ineffective assistance of counsel White must determine both deficient performance and prejudice...see **Strickland v. Washington** 466 U.S. 668, 690, 694, 104 S.Ct 2052, 80 L.Ed 2d 674 (1984) counsel performance specially fell outside the range of professionally competent assistance and there is a reasonable probability that, but for counsel's unprofessional errors the result of the proceeding would have been different.

However, in issue two, Petitioner White asserts that, had not been for the mere deviation from the constitution and principle formatted by the framers of the Bill of Rights, by the 1986 Supreme Courts erroneous decision in **McMillan v. Pennsylvania**, that has been deemed "wrongly decided" and in violation of the United states Sixth Amendment Jurisprudence. Since it cannot be home to both **McMillan** and **Apprendi**. This constitutional finding of facts committed by the District Judge violate and has a profound affect on the liberty and integrity of the judicial proceedings. Had this deviation from the constitution had not occurred, the outcome of the petitioner's sentencing would have been quite different. Furthermore, the penalty phase and drug amount are not charged in the indictment and proven to the jury to determine, the maximum sentence is 20 years under U.S.C. 841(b)(1)(c). The Petitioner has shown a denial of a substantial constitutional right. It's almost fair to say that the District Judge deliberately abused its discretion in removing from the jury the assessment of facts. When this has always been the law. So the substantial constitution question of law is; Did the District Court know that he was violating the Petitioner's constitutional right to have the jury determine every element of the offense, beyond a reasonable doubt?

The Judge should never be the legislator, because then the will of the Judge would be the law...see **Rogers v. Tennessee** 532, U.S. 451, 149 L.Ed 2d 697, 121 S.Ct 1693 (2000). In 1986, the anti-drug abuse act of 1986 "defined every narcotic drug" as elements. While some early American Statutes provide ranges of permissible sentences, K. Stith and J. Cabranes, fear of judging, sentencing

guidelines in the Federal Courts (1998). The ranges themselves were linked to particular facts constituting the elements of the crime e.g. Lacy v. State 15 Wis 13 (1862). While a fact was by law essential to the penalty it was an element of the offense. These widely recognize principles, followed a well-established practice of including in the indictment and submitting to the jury every fact that was a basis for imposing or increasing punishment. While an exhaustive history needn't ^{not} recounted here..see id. at 501-509 120 S.Ct 2348, 147 L.Ed 2d 435 Thomas J. concurring, detailing practices of American Courts from the 1840's and onward. A few particularly salient examples illustrate the point in Hope v. Commonwealth 50 Mass 1349 metc 134 (1843). The Petitioner asserts that, the failure to object to drug amount falls on the appointed counsel's errors not the Petitioner's and a procedural default should not be held against the Petitioner for the attorney's errors. However, the United States Supreme Court overruled McMillan because the reasoning of that decision has been thoroughly undermined by intervening decisions and because no significant reliance interest are at stake that "might justify adhering to their result." Like Wise, J. Alito exaggerates when he suggests that this case creates an important "precedent about precedent" Post at 2. rarely will a claim for stare decisis be as weak as here. Where a constitutional rule of criminal procedure is at issue that the majority of the court has previously recognized is incompatible with our broader jurisprudence. The McMillan foundation was based on the fact of an element to be considered as a sentencing factor that allowed a Judge to consider facts instead of the jury and this wrongly decided decision violate Petitioner's due process under Winship.

Petitioner White's Sixth Amendment and fifth Amendment Right were both violated when the appellate court assumed what any reasonable Jury would have done. While the jury in White's case was never given the option to determine drug quantity of powder cocaine. The sentencing judge gives Petitioner White 5 or 6 Kilograms of crack cocaine. A substance that is not even known to the court since crack cocaine is a street slang for cocaine base and cocaine base was not charged in White's indictment or given to the jury to determine. So in analyzing the evidence presented at trial to support a conclusion that the conspiracy distributed over five kilograms of powder cocaine as support of the sentence imposed by the court. The Seventh Circuit Court of Appeals assumed that the jury relied on the so-called overwhelming evidence, based on "hearsay" because the government never seized a single kilogram in this case, nor anything near the 500 kilograms the District Court's finding of facts are based on. So relying upon that assumption, the court was simply wrong. And a review of the trial transcript and jury instruction will show that the jury

was never asked to consider or pass upon the drug quantity involved in the Petitioner's case. Therefore, the District Court was never authorized to impose a sentence beyond the defaulted statutory maximum of 20 years set forth in 841(b)(1)(c) for an unspecified quantity of cocaine powder.

However, at White's resentencing proceedings, had defense counsel raised an Apprendi objection and requested a new factual finding on the drug quantity involved in the Petitioner's case consistent with the jury verdict alone, the District Court would have been limited to the defaulted statutory maximum of 20 years or 240 months set forth in 841 (b)(c)(1) since White is a first time non-violent offender.

Under the plain error review conduct by the Seventh Circuit Court of Appeals, the Apprendi error committed by the District Court at the original sentencing proceeding was merely repeated on appeal because the original drug quantity findings were based on a unconstitutional assessment of facts removed from the jury. In *United States v. United States Coin and Currency* 401 U.S. 715, 724 (1971). The use of flawless sentencing procedure legitimate a punishment where the constitution immunizes the defendant from the sentence imposed before *Siebold* 1000 U.S. 371 at 375 (1880) the law might have been thought to establish that so long as the conviction and sentence were imposed by a court of competent jurisdiction, no habeas relief could issue. In *Siebold* However, the Petitioner's attacked the judgment on the ground that they had been convicted under a constitutional statute. The court explain that if "this position is well taken, it affects the foundation of the whole proceedings, *Id* at 376, a conviction under a unconstitutional law.

As discussed, the court has concluded that the same logic governs a challenge to a punishment that the constitution deprives State and Federal Judges of authority to impose *Penry* *Supra* at 330..see collateral attack on criminal judgment, 38 U.S. Chi L. Rev. 142, 151 (1970) Broadly speaking, the original sphere for collateral attack on a conviction was where the tribunal lacked jurisdiction either in the usual sense or because the statute under which the defendant had been prosecuted was unconstitutional or because the sentence was one the court could not lawfully impose. A conviction or sentence imposed in violation of a substantive rule is not just erroneous but contrary to law and as a result, void...see *Siebold* 100 U.S. at 376 it follows, as a general principle, that a court has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether a

conviction or sentence became final before the rule was announced. A COA may issue only for a claim for which Petitioner White has made a substantial showing of the denial of a constitutional right see rule 22(h)(1) rule of appellate procedure. 28 U.S.C. 2253 (c)(2). This means, according to Miller-El v. Cockrell 537 U.S. 32 (2003) that "reasonable jurist could debate whether (or for that matter, agree that) the petition should have been resolved in a different manner or that the issue presenter were adequate to deserve encouragement to proceed further. Id. at 366 quoting Slack v. McDaniel, 529 U.S. 473 (2000) Dalton v. Battaglia 402 f.3d 729, 738, (7th Cir. 2005).

Therefore, the Petitioner respectfully asks this Honorable Court to resentence him to the 20 years maximum under 21 U.S.C. 841(b)(1)(c). the Petitioner has been locked up now 18 years 6 months, on an illegal and unconstitutional assessment of facts.

Respectfully Submitted,

Mark A. White 5.22.2016

Mark A. White

Declaration

I, Mark A. White, hereby declare under penalty of perjury (28 U.S.C. 1746) that the foregoing statements are true and correct to the best of my knowledge and belief.

I respectfully Submit.

Certificate of Service

I, Mark A. White, hereby certify that I have mailed a copy of my motion for a Certificate of Appealability "pursuant to 28 U.S.C. 2253(c)(2) including exhibits with postage to carry same, First Class, U.S. Mail to the person address appearing below this:

A.USA office

10.11. MARKET Street Suite 2100

INDIANAPOLIS, IN 46204

Mark A. White
Mark A. White

Date: 5.22-2016